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Nos. 94-12, 94-35, 94-189 and 94-219

In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(d)(7), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether Congress has authority under the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, to abrogate a State's immunity from suit.

2. Whether the doctrine of *Ex parte Young* permits a suit against a state governor arising from a State's failure to negotiate an Indian gaming compact in good faith.

3. Whether, if a suit to require a State and its governor to negotiate a gaming compact is precluded by sovereign immunity, the Secretary of the Interior has statutory authority under IGRA to prescribe regulations governing Indian gaming.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (18 U.S.C. 1162) nor any other provision of federal law authorized California to enforce its gaming laws with respect to bingo and card games conducted by Indian Tribes, because state law regulated rather than prohibited such gaming. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. 94-12 Pet. App. 3a. At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*

IGRA's purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over

class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) for class II gaming and is approved by the Chairman of the Commission; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian Tribe and the State. 25 U.S.C. 2710(d)(1). To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A).

Congress provided for judicial consideration of a Tribe's allegation that a State has failed to negotiate a tribal-state compact in good faith. Under 25 U.S.C. 2710(d)(7)(A)(i), "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact * * * or to conduct such negotiations in good faith." A

Tribe may initiate such a cause of action 180 days after requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(7)(B)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If the parties fail to conclude a tribal-state compact within that 60-day period, the Tribe and the State each must submit a proposed compact to a mediator appointed by the district court. 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then is to select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents within the 60-day period to the compact selected by the mediator, the compact shall be treated as a tribal-state compact entered into by agreement pursuant to 25 U.S.C. 2710(d)(3). See 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the

relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida requested the State of Florida to commence negotiations for a compact governing gaming operations proposed by the Tribe. 94-12 Pet. App. 44a. The State was willing to negotiate concerning card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over any form of casino gambling. For that reason, negotiations broke down. *Id.* at 45a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor. 94-12 Pet. App. 26a. The Tribe alleged that the State had failed to conduct good faith negotiations as required by 25 U.S.C. 2710(d)(3)(A). The Florida defendants filed a motion to dismiss on the ground that the Eleventh Amendment barred federal court jurisdiction over the suit. 94-12 Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA, and * * * that, pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." 94-12 Pet. App. 30a.

3. In July 1990, the Poarch Band of Creek Indians requested the Governor of Alabama to negotiate a compact to govern class III gaming. 94-189 Cross-Pet. 4. The State offered to negotiate concerning pari-mutuel wagering on horse, dog and simulcast races, but refused to negotiate concerning casino gambling. 94-35 Pet. 6-7. An impasse in the negotiations resulted. *Ibid.*

In September 1991, the Poarch Band filed suit against the State of Alabama and its Governor in the United States District Court for the Southern District of

Alabama. 94-35 Pet. App. B6. The Alabama defendants filed a motion to dismiss based on sovereign immunity. *Id.* at B8. The district court granted that motion. The court acknowledged that "IGRA clearly expresses Congress' intention to allow states to be sued by Indian tribes in federal court." *Id.* at B31. It held, however, that "Congress does not have the power to abrogate a state's Eleventh Amendment immunity when enacting legislation pursuant to its power found in the Indian Commerce Clause." *Id.* at B36-B37. In a separate order, the district court also dismissed the Tribe's claim against the Governor on sovereign immunity grounds. *Id.* at C1-C9.

4. The court of appeals consolidated the Florida and Alabama cases for purposes of appeal. The court agreed with both district courts that "Congress intended to abrogate the states' sovereign immunity." 94-12 Pet. App. 15a. It reasoned that "unless Congress intended to abrogate the states' immunity," the grant of jurisdiction in 25 U.S.C. 2710(d)(7)(A)(i) over claims that a State has not negotiated in good faith "would be of no effect." 94-12 Pet. App. 14a-15a.

The court went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court of appeals acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. 94-12 Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in

order to 'maintain[] free trade among the States, * * * the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" 94-12 Pet. App. 21a (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." 94-12 Pet. App. 21a. Second, the court observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against a State's governor to require good faith negotiations under IGRA. The court found the *Ex parte Young* doctrine inapplicable because it viewed negotiation of a compact under IGRA as discretionary and because it viewed a suit against the governor under IGRA as "in reality * * * against the State itself." 94-12 Pet. App. 23a-24a. The court reasoned that IGRA "uniformly addresses itself to 'the State'; not once does it impose duties or responsibilities on a particular officer of the state." *Ibid.*

Finally, the court discussed the question of "what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 94-12 Pet. App. 25a. Relying on the severability clause in IGRA (25 U.S.C. 2721), the

court expressed the view that if a State pleads an Eleventh Amendment defense and the case is dismissed, the Tribe "may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state." *Ibid.* At that point, the court continued, "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Ibid.*

Having held that sovereign immunity precluded suit under IGRA against a State or its governor without the State's consent, the court reversed the district court's decision in the Florida case and remanded with directions to dismiss the suit. 94-12 Pet. App. 25a. The court affirmed the order of dismissal in the Alabama case. *Ibid.*[1]

DISCUSSION

The tribal petitioners in Nos. 92-12 and 94-189 seek review of the court of appeals' holding that Congress lacks power under the Indian Commerce Clause to subject States to suit under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7). Review of that ruling is warranted because the court of appeals has, in essence, held an Act of Congress unconstitutional, and because its decision conflicts with the decisions of three other courts of appeals that have sustained the power of Congress to provide for the type of suit at issue here.

The tribal petitioners also seek review of the court of appeals' holding that an Indian Tribe may not bring a

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[1] While the appeal from the order denying the motion to dismiss the Florida case was pending in the court of appeals, the district court granted summary judgment on the merits in favor of Florida, finding that it had negotiated in good faith. The Seminole Tribe has appealed from that judgment, but its appeal has been stayed pending the outcome of the Tribe's petition here. 94-12 Pet. App. 84a.

suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the governor of a State arising from the State's failure to negotiate in good faith. Because a decision in the Tribe's favor on that issue might obviate the need for a resolution of the broader constitutional question, the Court should grant the Tribe's petition on the *Ex parte Young* question as well.

The state petitioners in Nos. 94-35 and 94-219 seek review of the court of appeals' expression of the view that, if a State does not consent to suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations to govern the conduct of gaming on the Tribe's Indian lands. That discussion in the opinion below is dicta, since the court ordered the case dismissed on sovereign immunity grounds, and the question does not in any event warrant plenary review at this time. We therefore suggest that the Court hold the States' petitions raising that issue pending its decision in Nos. 94-12 and 94-189.

1. a. Section 2710(d)(7)(A)(i) of IGRA provides that "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Although the court of appeals correctly interpreted this jurisdictional provision as manifesting Congress's intent to abrogate a State's immunity from suit,[2] it

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[2] Compare *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786-788 (1991) (holding that 28 U.S.C. 1362 does not manifest a sufficiently clear congressional intent to abrogate state sovereign immunity in suit by Tribe).

concluded that Congress lacked authority under the Indian Commerce Clause to accomplish such an abrogation. Thus, the court essentially held 25 U.S.C. 2710(d)(7)(A)(i) unconstitutional.

That holding conflicts with the holdings of the Eighth, Ninth, and Tenth Circuits. All three of those courts have upheld the constitutionality of 25 U.S.C. 2710(d)(7)(A)(i), reasoning that Congress has the power under the Indian Commerce Clause to abrogate a State's immunity from suit. *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians* v. *Washington*, 28 F.3d 991, 995-997 (9th Cir. 1994), petition for cert. pending, No. 94-357 (filed Aug. 29, 1994); *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422, 1427-1432 (10th Cir. 1994), petitions for cert. pending, Nos. 94-1029 & 94-1030 (filed Dec. 9, 1994). Review is warranted to resolve that circuit conflict regarding the constitutionality of Section 2710(d)(7)(A)(i).

b. The constitutionality of 25 U.S.C. 2710(d)(7)(A)(i) follows from this Court's decision in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which sustained the power of Congress under the Interstate Commerce Clause to provide for suits against States. In light of Congress's special powers and responsibilities with respect to Indians, "Congressional power pursuant to the Indian Commerce Clause * * * cannot be less than its authority under the Interstate Commerce Clause." *Spokane Tribe*, 28 F.3d at 997.

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held that Congress has power under Section 5 of the Fourteenth Amendment to abrogate a State's immunity from suit. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of

the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456. In *Union Gas*, the Court held that Congress also has authority under the Interstate Commerce Clause to abrogate a State's immunity from an action for money damages. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point, rather, is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17.[3]

It follows a *fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Commerce Clause of the Constitution (Art. I, § 8, Cl. 3), the Clauses reserving the Treaty powers to the President and the Senate (Art. II, § 2, Cl. 2); and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959), citing *United States* v. *Kagama*, 118 U.S. 375 (1886). Congress's power to regulate Indian commerce is rooted

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[3] Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

in the same Clause as its power to regulate interstate commerce, and there is no reason for concluding that its power to provide for suits against States is any less under the Indian component of that Clause than it is under the interstate component. As this Court stated in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989), the Indian Commerce Clause confers on Congress the "plenary power to legislate in the field of Indian affairs."

Indeed, one of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." The Federalist No. 42, at 268-269 (C. Rossiter ed. 1961). The division of authority also proved unsatisfactory in practice, because the proviso was relied upon by Georgia and North Carolina to treat with the Indians regarding their land and other objects and thereby "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). In response to those difficulties—and to the resulting potential for individual States to undermine the security of the United States and the States' collective commitment to the Indians—a committee of the Continental Congress submitted a report in August 1787, while the Constitutional Convention was sitting.

The committee recommended that if the States did not cede the Indian territory within their borders to the United States, they should "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said states, so that Congress, in either case, may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people." 4 J. Amer. Cong. 767 (Way & Gideon ed. 1823); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559. The Framers embraced the latter solution, and, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 561 ("[t]he whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States").

c. The court of appeals acknowledged that *Union Gas* is the closest precedent, but then sought to distinguish it on two grounds. 94-12 Pet. App. 18a-22a. Neither is persuasive.

First, the court observed that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause allows Congress to place limits on the States to "maintain[] free trade among the States * * *, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." 94-12 Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the issue in this case. In particular, they do not suggest that Congress lacks the power under the latter Clause that *Union Gas*

sustained under the former. To the contrary, Congress's unique power with respect to Indians, its authority and practice of protecting Tribes against state encroachments, and the historical and textual parallels between relations with Indian Tribes and relations with foreign nations, suggest that Congress has the same or greater power to abrogate state immunity from suit under the Indian Commerce Clause.

The court of appeals also sought to distinguish this Court's precedents on the ground that they involved situations in which Congress authorized suits against a State when a State was engaged in an activity "typical of private individuals" and "outside the typical realm of state authority." 94-12 Pet. App. 21a-22a. This Court's precedents do not support such a restricted view of Congress's power under the Clauses of the Constitution that permit it to authorize suits against States. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. And in *Union Gas*, the nature of the State's activity—owning a hazardous waste site—was not mentioned as a factor in the decision. The important factor in *Fitzpatrick* and *Union Gas* was that the States had ceded a portion of their traditional authority when they gave Congress the power to enforce the Fourteenth Amendment and to regulate interstate commerce. As we have explained above, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

In any event, the court of appeals erred in characterizing state negotiations with Indian Tribes as within the traditional sphere of state authority. 94-12 Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national Government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, *supra*. IGRA is consistent with that constitutional arrangement.

2. The tribal petitioners also challenge the court of appeals' holding that a suit cannot be brought under the doctrine of *Ex parte Young* against the governor of a State arising from the failure by the State to engage in good faith negotiations under IGRA. Under the doctrine of *Ex parte Young*, sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 104-106 (1984). The tribal petitioners have sought such relief here: They have each sought prospective relief to require the governor to carry out the State's obligation under federal law to negotiate a compact in good faith.

The court of appeals concluded that *Ex parte Young* was inapplicable because negotiating a compact is discretionary. 94-12 Pet. App. 23a-24a. Under IGRA, however, once a Tribe requests the State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). If the State does not do so, it can lose the opportunity to shape the scope of gaming activity that will ultimately be permitted under federal law. See 25 U.S.C. 2710(d)(7)(B)(iv) (authorizing court-appointed mediator to choose between proposals submitted by the Tribe and the State); 25 U.S.C. 2710(d)(7)(B)(vii) (authorizing the Secretary of

the Interior to prescribe gaming consistent with the compact selected by the mediator).

The court of appeals also regarded *Ex parte Young* as inapplicable because the tribal suits are, in its view, in reality against the State. 94-12 Pet. App. 24a. But the State is the real party in interest in all official capacity suits. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Pennhurst*, 465 U.S. at 107-109 & n.17. Under *Ex parte Young*, the state officer's failure to abide by federal law strips the officer of whatever protection from suit the State might have. *Pennhurst*, 465 U.S. at 104. Accordingly, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* "notwithstanding the obvious impact on the State itself." *Pennhurst*, 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes substantive and remedial obligations on the State, and not on any particular state official. 94-12 Pet. App. 24a. A State, however, can negotiate only through its officials. The obligations that IGRA places on a State can therefore readily be understood to fall on those officials who have authority under state law to negotiate on behalf of the State. Cf. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286 (1913) ("The provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power."). There is no apparent dispute in these cases that the governor is the official who has authority in both Florida and Alabama to negotiate on behalf of the State.

If the Court grants review on the question of Congress's power to abrogate the States' sovereign immunity in this setting, it should also grant review of

the question whether a suit may be brought against a governor under the doctrine of *Ex parte Young* to effectuate the compact-negotiation provisions of IGRA. The two questions involve the same statutory section, and a decision on the latter might render it unnecessary to consider the broader constitutional issues raised by the former.

3. Finally, the state petitioners present questions related to a statement in the court of appeals' opinion that if a State asserts its immunity from suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations for Indian gaming on the Indian lands of that Tribe. 94-12 Pet. App. 25a. The court's discussion of that issue, however, is dictum. Although the state petitioners assert that the court of appeals has created a remedy in favor of the Tribes (94-35 Pet. 10; 94-219 Cross-Pet. 9), the only relief ordered by the court of appeals was dismissal of the suits filed by the Tribes. 94-12 Pet. App. 25a. The court has not required the Secretary to prescribe regulations; it has not precluded the States from arguing to the Secretary that he has no authority to do so; and it has not precluded the States from later bringing a judicial challenge to any assertion of such authority by the Secretary. As Florida acknowledges (94-219 Cross-Pet. 11), what the state petitioners object to is nothing more than a "discussion" of an issue. Plenary review of that issue at this time is therefore unwarranted, even if the Court were to affirm the court of appeals' judgment dismissing these suits. Moreover, no court of appeals has expressed a contrary view on that issue—or even had occasion to do so—since the three other courts of appeals that have considered suits against States under IGRA have upheld Congress's power to authorize such suits.

We do not, however, urge the Court to deny the States' petitions outright at this stage. Plenary consideration of the sovereign immunity and *Ex parte Young* issues raised by the Tribes could conceivably lead the Court to take a different view of the proper disposition of the States' petitions when the Court renders its decision on the merits, and there is no reason for the Court to foreclose its ability to do so.

CONCLUSION

The petitions for a writ of certiorari in Nos. 94-12 and 94-189 should be granted. The petitions for a writ of certiorari in Nos. 94-35 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in Nos. 94-12 and 94-189.

Respectfully submitted.

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